IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
April 10, 2001 Session

STATE OF TENNESSEE v. TERRY WILLIAMS

Direct Appeal from the Criminal Court for Shelby County
No. 98-09417-19 James C. Beasley, Jr., Judge

No. W2000-00694-CCA-R3-CD - Filed July 27, 2001

The defendant appeals his convictions of theft over $1000, a Class C felony, and evading arrest, a Class E felony. Tenn. Code Ann. §§ 39-14-103 and 39-16-603(b). The defendant received an effective sentence of eighteen years as a career offender. The defendant first contends that the evidence was insufficient to prove the value of the stolen property. He also contends that his trial counsel was ineffective for failing to provide him with "street clothes" to wear during his jury trial. After careful review, we conclude that the evidence was sufficient to establish that the value of the stolen property was over $1000 and that trial counsel was not ineffective for failing to provide the defendant with different clothes to wear during his jury trial. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOE G. RILEY and ROBERT W. WEDEMEYER, JJ., joined.

Robert C. Brooks (on appeal), Memphis, Tennessee; A C Wharton, Jr., District Public Defender, and Michael J. Johnson, Assistant District Public Defender (at trial), for the appellant, Terry Williams.

Paul G. Summers, Attorney General & Reporter; Mark E. Davidson, Assistant Attorney General; William L. Gibbons, District Attorney General; and Daniel Scott Byer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On May 5, 1998, the defendant, Terry Williams, was arrested for theft of an automobile and for felony evading arrest. On July 7, 1998, the grand jury handed down two indictments against the defendant for theft over $1000 and one indictment for felony evading arrest. On August 18, 1998, the defendant was convicted by a Shelby County jury of one count of theft over $,000 and one count

of felony evading arrest. The defendant filed a motion for a new trial and a hearing was held on February 23, 2000. The defendant's motion was subsequently denied and this appeal followed.

Facts

Sometime prior to April 26, 1998, Mr. Mickey Brown entered into an agreement with his employer, Mrs. Betty Jones, to buy an Isuzu flatbed truck which Mr. Brown used regularly while working for Mrs. Jones. Prior to the two entering into the buy/sell agreement, Mr. Brown had worked for Mrs. Jones for approximately five years and had been friends with Mrs. Jones for twelve to fifteen years. Both Mr. Brown and Mrs. Jones agreed that while Mr. Brown was making payments on the truck note, both Mr. Brown and Mrs. Jones could drive the truck.

On April 26, 1998, at approximately 2:00 p.m., Mr. Brown left a construction site in the Isuzu truck and drove to a nearby convenience store to pick up drinks for himself and his co-workers. When Mr. Brown returned to the construction site, he turned the truck off. The keys were left in the ignition.

Within minutes of getting out of the truck and taking his co-workers their drinks, Mr. Brown heard the truck start. He looked out and saw someone driving away in his truck. Mr. Brown could not identify the person. He did not give the defendant permission to drive his vehicle. He reported the theft immediately. The truck was not seen again until May 6, 1998.

On May 6, 1998, Memphis Police Department Police Service technicians pulled up behind a truck that appeared to be abandoned on the side of the road. When the Police Service technicians called in the license plate number of the truck, they were informed that the truck had been reported stolen. A tow truck was called. However, while the Police Service technicians were waiting for the tow truck to arrive, the defendant came walking up to the truck with a gas can. The defendant asked the Police Service technicians if there was a problem and the Police Service technicians told the defendant no. The defendant explained to the Police Service technicians that the truck had run out of gas.

After the defendant went to the truck and began putting gas in the tank, the Police Service technicians called and requested an officer to be sent to the location where the truck was located so that the defendant could be detained. After calling for a squad car, one of the Police Service technicians got out of the car and approached the defendant, telling the defendant that he would leave his lights flashing in his car and stand with him to help him avoid being struck by oncoming traffic. In the meantime, however, the defendant nervously and rapidly continued to pour the gas from the can into the gas tank of the truck. A few seconds before the requested squad car arrived, the defendant finished pouring the gas from the can into the truck gas tank. The defendant then jumped into the truck and drove off.

After the defendant left the scene where the truck had been stopped, a police pursuit developed with the defendant driving at speeds between 65 and 70 m.p.h. in a 40 m.p.h. speed zone.

The defendant was pursued by a police squad car with its lights and sirens on; nevertheless, the defendant failed to stop. Finally, the defendant drove the truck into some woods, jumped out, and attempted to run. A Memphis police officer chased after the defendant and eventually succeeded in apprehending him.

After the defendant was arrested, he was tried and convicted by a Shelby County jury of theft of property over $1000 and felony evading arrest. The defendant was subsequently sentenced to consecutive sentences of twelve years and six years, as a career offender. The defendant's motion for a new trial was ultimately denied and this appeal followed.

Analysis

A. Sufficiency of the Evidence

When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Brewer, 932 S.W.2d 1,18 (Tenn. Crim. App.1996).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the State the strongest legitimate view of the evidence contained in the record, as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App.1995).

The trier of fact, not this court, resolves questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence. *Id.* In State v. Grace, the Tennessee Supreme Court stated, "[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." 493 S.W.2d 474, 476 (Tenn. 1973).

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

The defendant argues that the value of the vehicle was not established by sufficient evidence. The defendant does not contest the sufficiency of the jury's determination concerning the taking without the owner's consent. Should the State have failed in proving the value of the vehicle beyond

a reasonable doubt, the defendant's conviction for a felony theft could not stand and the same would be reduced to misdemeanor theft. See Tenn. Code Ann. § 39-11-106(a)(36)(C).

Without citing to any authority, the defendant argues that the value of the truck should be determined according to its "fair market value." The defendant quotes Black's Law Dictionary in setting out the definition of "fair market value," - "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction." Black's Law Dictionary 1549 (7th ed. 1999). In our analysis, we determine that value is defined in Tennessee Code Annotated section 39-11-106(a)(36)(A)(i) as "the fair market value of the property or service at the time and place of the offense; or (ii) if the fair market value of the property can not be ascertained, the cost of replacing the property within a reasonable time after the offense." We accept the defendant's contention that the fair market value is the correct value to be utilized in the instant case in determining whether a theft over $1000 has occurred. Further, fair market value may be established by the offering of expert testimony as the defendant suggests. However, we reject the defendant's contention that such expert testimony is required.

Applying the definition of "fair market value," we examine the evidence in the instant case that goes to the value of the stolen truck. At trial, Mrs. Jones testified that she agreed to sell the Isuzu truck to Mr. Brown for $1500 at payments of $25 per week. Mr. Brown testified that he agreed to buy the truck from Mrs. Jones for $3000 at payments of $50 per week. This transaction occurred approximately two months before the time of this offense. While there exists a discrepancy between what the parties believed the sale price to be, the jury was in a position to accept either value and such would be sufficient to establish a value over $1000. The time frame of this transaction is not so remote from the date of the offense so as to render the evidence as to the truck's value irrelevant. Further, the record does not reveal any evidence of an inflated price, nor does it reveal a superior bargaining position enjoyed by the seller against the buyer. The defendant has failed to demonstrate why the evidence is insufficient to support the verdict returned by the jury.

B. Ineffective Assistance of Counsel

This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

The test in Tennessee to determine whether counsel provided effective assistance is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999). Therefore, in order to prove a

deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S.Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

Prior to continuing in our analysis, we pause to clarify the second issue raised in this case. Specifically, the defendant's ineffective assistance of counsel claim is based upon trial counsel's failure to provide the defendant with "street clothing" to wear during his trial. This ineffective assistance of counsel claim is not based upon trial counsel's failure to object to the defendant's trial proceeding while the defendant had only prison issued clothing to wear during his trial.

In turning to the facts in the instant case, the defendant argues that trial counsel was ineffective because trial counsel failed to provide him with "street clothes" to wear during trial. In examining the first prong of our test for determining whether trial counsel was ineffective, we look to whether trial "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." While the defendant may have a right to stand trial before a jury wearing clothes other than prison clothes, State v. Zonge, 973 S.W.2d 250, 257 (Tenn. Crim. App. 1997), this right does not impose upon trial counsel a duty to provide the defendant with clothes. Considering the clothing that the defendant wore during his trial did not say "Jail," "Tennessee Department of Corrections," or anything else that could have cued the jury in to the defendant's current incarceration or the origin of the clothing worn by the defendant, this court can not conclude that trial counsel's failure to ask the trial court for alternative clothing was "so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Certainly, the clothing the defendant wore was no suit and tie. However, in the same breath, it was not bright orange, was not laden with black and white stripes, nor was it tainted with any other tell-tale signs of being clothing issued by a detention facility.

While the defendant has failed to prove the first prong of the two part test in establishing ineffective assistance of counsel, we will take the opportunity to briefly address the "prejudice" issue in the second prong of the test. During this court's review of the record, we had the opportunity to see a photograph of clothing similar to that worn by the defendant at his trial. The clothing is plain and very much resembles scrubs worn by doctors and nurses in the medical field, and frequently worn by common citizens who are dressed casually. The clothing gives little, if any, hint of being clothing issued by a detention facility to its inmates, as we have already set forth above. This issue is without merit.

C. Additional Issues

Prior to concluding our analysis in the instant case, we address two other issues that merit attention. First, we note the defendant's claims that he "diligently," "firmly," and "repeatedly" insisted on being provided with "street clothing" to wear during his trial. The record is clear that the defendant asked for different clothing to wear during his trial other than the clothing issued to him by the detention facility where he is an inmate. The record is also clear that the defendant asked for different clothing only two or three times and only twenty-four hours prior to the commencement of jury selection. The record before us also shows that 468 days passed from the time the defendant was incarcerated for the crimes in the instant case to the time of the defendant's trial. Had the defendant attempted to obtain different clothing to wear during his trial more than one day before the commencement of jury selection, it is likely that he would have been more successful. Further, when the defendant was asked whether his family was able to provide him with clothing to wear during his trial, the defendant only answered that they were indigent. The defendant never indicated that he even asked his family for help in securing different clothing to wear during his trial. The defendant's failure to adequately and diligently pursue different clothing to wear during his trial can only be placed on himself.

Second, we take note of the defendant's ineffective assistance of counsel claim in this direct appeal, as opposed to a post-conviction appeal. On numerous occasions, this court has warned against the pitfalls of raising such an ineffective assistance of counsel issue on direct appeal. Once again, we pause to echo this warning as set forth by Judge Jones of this court in State v. Jimmy L. Sluder:

> Raising issues pertaining to the ineffective assistance of counsel for the first time in the appellate court is a practice fraught with peril. The appellant runs the risk of having the issue denied due to a procedural default, or, in the alternative, having a panel of this court consider the issue on the merits. The better practice is to *not* raise the issue on direct appeal .... The issue can be subsequently raised in a post-conviction proceeding if the appellant's direct appeal ... is not successful.

State v. Jimmy L. Sluder, C.C.A. No. 1236, 1990 WL 26552, *9 (Tenn. Crim. App., filed March 14, 1990, at Knoxville); *see also* Thompson v. State, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997); State v. Anderson, 835 S.W.2d 600, 607 (Tenn. Crim. App. 1992); State v. Davis, C.C.A. No. 01C01-9202-CC-00062, 1993 WL 75046, *3 (Tenn. Crim. App., filed at Nashville, March 17, 1993).

CONCLUSION

Having concluded that the evidence given at trial regarding the value of the stolen truck was sufficient to find the defendant guilty of theft of property over $1,000, and having concluded that counsel was not ineffective for failing to provide the defendant with different clothing to wear during his trial, we affirm the judgments of the trial court.

_____

JOHN EVERETT WILLIAMS, JUDGE